

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.146 of 2004

1. Girja Devi widow of late Shyam Sunder Lal
2. Ramesh Prasad Lal
3. Shambhu Lal, son late Shyam Sunder Lal
4. Lallu Lal, son late Shyam Sunder Lal
5. Sanjai Kumar Lal @ Sanjay Lal, son late Shyam Sunder Lal
6. Dabbu Lal, minor son of Ramesh Prasad Lal, u/g of his father.
7. Ram Lal son of Late Vanarsi Lal (dead)

All resident of Mohalla-Anandi Babu Lane, Adampur Barari, P.S.
Barari, District- Bhagalpur.

... .. Plaintiffs/Appellants/Appellants

Versus

- 1(a). Runu Bose, W/o Late Kalyan Kumar Bose
 - 1(b). Ashok Kumar Bose, S/o Late Kalyan Kumar Bose
 - 1(c). Amitabh Bose, S/o Late Kalyan Kumar Bose
 - Allr esident of 13, North Road, Kolkata-32, P.S.-Jadavpur, Dist-24 Pargana (West Bengal).
 2. Mrs. Runu Alis Ramu Bose (dead and expunged vide order No. 14)
 3. Dr. Jayant Kumar Bose, son of late Dr. A.K. Bose
 4. Pratik Kumar Bose, son of late Dr. A.K. Bose
 - Both resident of 2nd Floor, residents of 497/D-Block (M), New Alipur, Calcutta-53.
 5. Dr. Santosh Kumar Bose, son of Harish Chandra Bose, resident of 28/1/3 Garaibat Road, Calcutta-19.
 - 6(a) Amla Bose, resident of 1/14 Gariabat Road, South plot of Jodhpur park, Calcutta-31.
 - 7(a) Ritik Bose, s/o Late Indu Bhushan Bose, resident of Northern Avenue, Paikpore, Calcutta-30.
 - Defendant 1st Party/Respondent 1st Party/ Respondent 1st Party
 8. Ramashish Sharma, son of late Mukteshwar Prasad Sharma, Resident of Village-Parpur, P.S.-Shahkund, District-Bhagalpur.
 - Defendant 2nd Party/Respondent 2nd Party/ Respondent 2nd Party
 9. Administrator, Bhagalpur Municipal Corporation having office at Court Compound Bhagalpur.
 - Defendant 3rd Party/Respondent 3rd Party/ Respondent 3rd Party
 - Respondents
-

Appearance :

For the Appellants	:	Md. Waliur Rahman, Advocate Md. Khurshid Alam, Advocate Mr. Nishant Kumar Sinha, Advocate
For the Respondents	:	Mr. Mritunjay Prasad Singh, Advocate Mr. Rajesh Kumar Singh, Advocate Mr. Ram Parwesh Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

C.A.V. JUDGMENT



Date : 25-06-2019

In the present second appeal the plaintiffs are the appellants, who are aggrieved by the judgment and decree dated 24.03.2014 passed by learned 1st Additional District Judge, Bhagalpur, in T.A. No. 17 of 1993, whereby he has affirmed the judgment and decree dated 26.08.1987 passed by learned Sub-Judge-3, Bhagalpur, in T.S. No. 236 of 1980, dismissing the suit.

2. This is to be noted, at the outset, that this appeal was admitted by an order dated 09.05.2008 and following two substantial questions of law were framed :-

“(i) Whether the learned courts below rightly relied upon sale deed dated 29.01.1980, Ext.-C, which was claimed to be executed by the power of attorney holder of the owner, although neither the said power of attorney was produced, nor the owner or the attorney came to depose in favour of the parties relying on the sale deed?

(ii) Whether in the absence of any material it could have been held that the plaintiffs were tenants although the plaintiffs had been found on the basis of valid materials that they were in possession of the suit premises since 1920 on the basis of settlement made by the then Sonbarsa Estate which was the ex-intermediary and no objection had ever been raised by them against the claim of the plaintiffs?

3. In course of submissions made on behalf of the appellants, learned counsel appearing on behalf of the appellants has attempted to convince this Court that following two additional



substantial questions of law also arise for determination in the present second appeal: -

“(i) Whether the judgment and decree of both the court below are sustainable when the core issue apparent from pleadings of the parties, whether the suit property belongs to Barari Estate/Sonbarsha Raj or Bardaman Estate has completely lack, can decide the subsequent title of either of the parties?”

(ii) Whether the Ext-C, Sale deed dated 19.1.1980 shows that the property which has transferred by the Power of Attorney holder that part property which transferred has got by way of ‘Amalnama’ would be a valid transfer to the extent when the meaning of amalnama as per the H.H.Wilson Dictionary is otherwise?”

4. Whether suit property belongs to *Barari Estate/Sonwarsa Raj* or *Bardhman Estate* is a question of fact, which was admittedly not raised before the first appellate court and is being raised for the first time in the present second appeal. In my opinion, none of the two questions, as proposed on behalf of the appellants, can be said to be substantial questions of law, for the purpose of present adjudication in second appeal.

5. The dispute relates to a piece of land under Tauzi No. 146, 146/1 and 4097, situate at *Mohalla Adampur*, admeasuring two bighas four kathas and eight dhurs, with a building, bearing existing Holding No. 8, 9, 10, 11 and 12 under Bhagalpur Municipality.



6. Briefly narrated, it has been the case of the plaintiff that the disputed property was within the *zamindari* of one Sri Suresh Mohan Thakur of *Barari* and others. According to the plaintiffs, as stated in the plaint, “The said land was land of *Sonbarsa Raj*, who was *raiyat*, and who relinquished his title and possession and delivered the possession of the same to Durga Lal, the grandfather of the plaintiff No.2, and Shyam Sunder Lal, deceased, and ancestor of plaintiff Nos. 1(a to c) in the year 1920, and since then Durga Lal and his descendants came in peaceful possession of the holding as owner”. After his death, the only son Banarsi Lal came in possession, who was recorded in the return filed by the estate of *Barari* to the Government of Bihar. After death of Banarsi Lal, his two sons, Shyam Sunder Lal and Ram Lal, came in possession over the suit land. Valuation return was also filed in the year 1924 in the name of Durga Lal, who was shown as *raiyat* of the said holding by virtue of the transfer made to him by *raiyat Sonwarsa Raj*. It was further case of the plaintiffs that holding No. 7 to 12 had been wrongly recorded in the name of the defendant 1st party in Municipal records. The plaintiffs did not raise any claim over holding No. 7, but they questioned municipal entries in the names of Bose family in respect of holding No. 8 to 12 as illegal. The plaintiffs further claimed that their names stood



recorded in the *sherista* of the State of Bihar in the Anchal of Jagdishpur. An attempt was made by the defendant No. 2, acting as an agent of the defendant 1st party, to get the *jamabandi* created in Jamabandi Correction Case No. 7 of 1978-79, which was rejected upon an enquiry and plaintiffs' name was entered as owner over the holding, by grant of receipt. The Deputy Collector Land Reforms had confirmed the recommendation of Karamchari and the Circle Officer in favour of the plaintiffs and the appeal preferred by the defendant 2nd party, again acting as caretaker of the defendant 1st party, before the Additional Collector was also dismissed. A revision petition filed before the Commissioner, Bhagalpur, was also dismissed. A proceeding was thereafter initiated at the instance of the defendant 2nd party under Section 144 of the Cr.P.C. in respect of Holding No. 11, Anandi Babu Lane, which was registered as Misc. Case No. 551 of 1978. In a proceeding under Section 144 of the Cr.P.C., defendant No. 2 alleged commission of acts of forgery against Shyam Sunder Lal and Ram Lal in some of the Government papers, which documents were found to be genuine and not forged by the Sub Divisional Officer. Subsequently, under the order of learned District and Sessions Judge, Bhagalpur, a detailed enquiry was held by Sub Divisional Officer, Bhagalpur, who again did not find any element



of forgery. Defendant 2nd party thereafter filed a petition before the Additional Collector, giving rise to Misc. Case No. 1 of 1986, which was returned to the Land Reforms Deputy Collector, which, till the filing of the suit, was pending. He filed a new Kabillagan Case No. 111 of 1985-86, which was not entertained on the ground of the same being hit by the principles of *res judicata*. An application was thereafter filed before the municipal authorities, Bhagalpur, for deleting the name of the defendant 1st party from the records, which was dismissed. A sale deed was subsequently executed by defendant No. 1 in favour of defendant 2nd party on 29.01.1980. who applied for mutation, which was allowed on 08.12.1980.

7. It was their further case that a false report was submitted by the Municipal Officers without any knowledge of the plaintiffs and thus their application before the Municipal Authorities for deleting the names of defendant 1st party was erroneously rejected. According to the plaintiffs, the defendant 1st party or their ancestor could not claim the suit property as part of the Burdwan Estate, as the Burdwan Estate had no lands by the side of Adampur Ghat. Accordingly, another application was filed seeking reconsideration before the municipal authorities, which was also not entertained.



8. They asserted that they had been exercising their right as owners and had dealt with the property and their vendees, too are in possession of the same. Citing one example, they pleaded that a part of Holding No. 11 had been sold to one Anju Rani Verma, whose name had been mutated. They further claimed that the name of defendant 2nd party was not liable to be mutated because his vendor did not have right and title, but despite that the Special Officer, Bhagalpur Municipality, by his order dated 08.12.1980 allowed the mutation of the defendant second party and rejected the prayer of Anju Rani Verma, the vendee of the plaintiffs. The plaintiffs also pleaded that defendant 2nd party had claimed Holding No. 7 also, though wrongly, to be belonging to the defendant 1st party. The plaintiffs questioned the survey entry on the ground that the same were made only on the basis of municipal records and no local inspection was ever done. With the above pleading, the plaintiffs sought for the following reliefs :-

“(A) That the Court be pleased to hold and declare that the plaintiffs are rightful owners of the suit property and the defendants have no right in the same and that the defendant 2nd party had not acquired any right and title on the basis of *kebala* dated 29.01.1980 and the *kebala* is not binding on the plaintiffs;

(B) On the above adjudication, the Court be pleased to hold and declare that order of the Special officer, Bhagalpur Municipality and the survey entries had not affected title of the plaintiffs;



(C) Cost of the suit be awarded to the plaintiffs.

(D) Any other relief or reliefs, which the Court deems fit and proper in the facts and circumstances of the case.”

9. The defendant No. 2 filed a detailed written statement. Preliminary objections over maintainability of the suit itself were raised on the ground of limitation and non-joinder of necessary parties. According to the defendant No. 2, the sons and daughters of defendant 1st party were necessary parties, whose non-impleadment rendered the suit suffering from misjoinder of necessary parties. It was also pleaded that as the plaintiffs did not seek further relief for setting aside the sale deed dated 29.01.1980, the suit was hit by the provisions of Section 34 of the Specific Relief Act. Defendant No. 2 took a plea that the plaintiffs were tenants in the part of Holding no. 11 and while looking after the said property they maintained covetous eyes and to fulfill the said object, they had approached the municipal authorities as well as the survey authorities to get their names recorded in the municipal and survey records of rights and since they failed to achieve that, they filed the suit. The description and area of land given in the schedule of the plaint was also disputed and it was asserted that the Holding No. 7 had been wrongly left out. They disputed the plaintiffs' claim that the subject matter of the suit was ever within



the proprietary interest of Suresh Mohan Thakur. It was rather pleaded by the defendant No. 2 that the suit was within the proprietary interest of Burdwan Estate, whereas plaintiffs falsely claimed themselves to be tenants of Barari Estate. The defendants also asserted that the plaintiffs were not clear as to when the said Durga Lal died and how Banarshi Lal came in possession of the disputed land and asserted that it was beyond reason to claim that return of the suit land was submitted by Estate of Barari when the suit property was within the *jamindari* of Burdwan Estate. The claim of the plaintiffs that delivery of possession was given by Sonwarsha Raj, as asserted in paragraph 2 of the plaint, was not consistent with the statement made in paragraph 5 and that the mode of transfer, through which the transaction had taken place, had not been given in the plaint. Referring to the cess value return filed sometime in the year 1924 in the plaint, the defendant No.2 took a plea in the written statement that the same relates to Tauzi No. 146/4097 of Mauza Nisf, Adampur submitted by Naresh Mohan Thakur and Suresh Mohan Thakur, whereas the suit property lies in Mauza Rapatganj, Adampur. He asserted the entry made in the Cess valuation return to be forged and fabricated. He questioned the title of the plaintiffs in the written statement.



10. Based on rival pleadings, the trial Court framed altogether 10 issues, which read thus :-

- “1. Is the suit as framed maintainable?**
- 2. Is the suit barred by law of limitation hit by resjudicata and law of waiver?**
- 3. Is the suit bad for non-joinder and misjoinder of parties?**
- 4. Have the plaintiff got valid cause of action for the suit?**
- 5. Is the suit hit by provisions of Section 34 of Specific Relief Act?**
- 6. Has the suit properly valued and sufficient advolerem court fee paid, is increased advolerem court fee for necessary for proper decision of the suit?**
- 7. Have the plaintiffs perfected right, title over the suit property?**
- 8. Have the plaintiffs acquired title by law a adverse possession?**
- 9. Has the defendant 2nd party acquired any right and title over the suit properties by means of Kebala dated 29-1-80 and are the plaintiffs owners or tenant on the suit property?**
- 10. To what other relief or reliefs plaintiff entitled to?”**

11. The parties adduced oral and documentary evidence at the trial before the Court of learned Sub-Judge-3, Bhagalpur, in order to address the issues so framed. The trial Court decided issues No. 1 and 2 in favour of the plaintiffs. Issue No. 3, however, was decided against the plaintiffs, in favour of the defendants. The



trial Court held that all members of the family of defendant No.1 ought to have been impleaded as parties and thereby refused to accept the plea of the plaintiffs that since they had impleaded all members concerned with the suit property, so far known to them, as defendants, the suit could be maintained.

12. The issue whether the suit was barred by virtue of Section 34 of the Specific Relief Act was also decided by the trial Court against the plaintiffs as the plaintiffs had omitted to seek cancellation of the sale deed 'Exhibit-C' executed in favour of defendant 2nd set. The trial Court observed that though there was prayer for declaring the sale deed dated 29.01.1980 (Exhibit-C) as void, they did not take any ground as to how the same was void. The Court went on to observe that the plaintiffs had purposefully omitted to seek setting aside of the sale deed to avoid payment of increased *ad valorem* Court fee. Accordingly, the trial Court held that the suit was liable to be dismissed for the said reason also.

13. Issue No. 7 was crucial issue to be decided by the trial Court. On perusal of the judgment and decree of the trial Court, I find that the trial Court after appreciating the evidence, both oral and documentary, reached a definite conclusion that there was no material on record to show that the plaintiff was in continuous possession over the suit land. Before reaching the



aforesaid conclusion, the trial Court referred to in detail the documentary evidence with reference to the location and description of the suit property. The trial Court thereafter took up the main issue in respect of the plaintiff's claim of having acquired title by adverse possession and answered the said issue also, in negative against the plaintiffs.

14. The plaintiffs filed an appeal against the judgment and decree of the trial Court, giving rise to First Appeal No. 616 of 1987. They took a plea that though a *bajidawa* is not a document of title, on the strength of the said *bajidawa*, the ancestors of the plaintiffs continued in peaceful possession over the land in question for more than sixty years, without any hindrance. They also asserted that since no remedy had been sought against Sonwarsha Raj, the suit could not have been dismissed on the ground of non-joinder of necessary party. The conclusion of the trial Court, that the suit was hit by Section 34 of the Specific Relief Act, was also assailed before the First Appellate Court as, according to the plaintiffs, no further relief was required to be sought since the sale deed itself was sought to be declared as void. According to the plaintiffs, the trial Court ought not to have considered issues No. 7, 8 and 9 together and that the trial Court had lost sight of the fact that possession of the plaintiffs for more



than 12 years had perfected their title against the whole world. The plaintiffs dealt in their memo of appeal, how the trial Court had mis-appreciated the evidence adduced at the trial.

15. I have referred to the grounds taken in the memo of appeal before the First Appellate Court for a specific purpose. Learned counsel appearing on behalf of the appellants, as has been noted above, has attempted to raise such additional substantial questions of law, which had not been raised before the Court below. No plea was taken that the issues were wrongly framed. It had been the case of the plaintiffs that the disputed property belonged to Barari Estate/Sonwarsha Estate, which has not found favour with the Courts below. This is the background why I have not found the proposed additional substantial questions of law to be the substantial questions of law for the purpose of present adjudication. The First Appellate Court, as has been noticed above, has affirmed the findings recorded by the trial Court.

16. Mr. Waliur Rahman, learned counsel appearing on behalf of the appellants, has relied on a Supreme Court's decision in case of *Achint Kumar Saha vs. Nanee Printers and Others* (AIR 2004 SC 1591) to submit that the main issue in the present second appeal revolves around whether the disputed land fell under Barari/Sonwarsha Estate or Burdwan Estate, as has been



held by the Courts below. He contends that this was the core issue, which ought to have been adjudicated upon by the Courts below. According to him, non-adjudication of the core issue results in a substantial question of law for entertaining a second appeal under Section 100 of the Code of Civil Procedure.

17. On careful examination of the materials on record, however, I find that the core issue, which required adjudication by the Courts below was, whether the appellants were in a position to establish their title over the suit property on the basis of their pleadings and evidence adduced on their behalf at the trial. The entire case of the appellants to establish their title over the suit property is evidently based on deed of relinquishment (*bazidawa*) purported to have been executed by Sonwarsha Raj, who was under the tenancy of Babu Suresh Mohan Thakur, the ex-landlord of Barari, as a raiyat. Indisputably, the deed of relinquishment was not brought on record by the appellants. The First Appellate Court, in my opinion, has rightly recorded that a deed of relinquishment does not create any title to a person. There is a concurrent finding recorded by both the Courts below, upon analysis and scrutiny of the evidence available on record to the effect that the plaintiffs' grandfather Banarshi Lal was a tenant before and after 1950 and he gradually asserted his ownership over the suit property. The



claim of the plaintiffs of adverse possession has been turned down and his possession has been held to be rather permissive. The trial Court has recorded in its finding, referring to Exhibit-H, that the rent receipts did not bear the date of issue, i.e., the time/date, to demonstrate since when the plaintiffs had started denying ownership of the others and they had started declaring their adverse possession over the suit property.

18. It is well settled principle of law that plea of adverse possession and title are mutually destructive and cannot go side by side. Further, plea of adverse possession, though may be asserted as a defence, plaintiff cannot set up his case of title on the basis of adverse possession, as has been held by the Supreme Court in case of *Gurudwara Sahib vs. Gram Panchayat Village Sirthala and Ors.*, reported in (2014) 1 SCC 669. Paragraph 8 of which is relevant and is being quoted hereinbelow : -

“8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence.”



19. Learned counsel appearing on behalf of the defendants, defending the judgments of the Courts below, has submitted, responding to the substantial questions of law framed by this Court, that non-production of power of attorney and non-examination of original land owners, who are the vendors of Exhibit-C, cannot improve the case of the appellants of their title over the suit property. He has submitted that the predecessors of the defendant 1st party had received the suit land along with part of the Holding No.7 through *Amlanama* in the year 1874 from the Burdwan Estate and partly through sale deeds, which fact has been duly taken note of in the judgments and decrees passed by the Courts below, which are under challenge.

20. As I have already referred to above, the Courts below have found the suit not maintainable on the ground of non-joinder of necessary parties and barred by Section 34 of the Specific Relief Act. Coming back to the relief, which the appellants had sought; they wanted a declaration that the plaintiffs were the rightful owners of the suit property and the defendants did not have any right in the same and, therefore, defendant 2nd party could not have acquired any right and title on the basis of the sale deed dated 29.01.1980. The appellants failed to establish their case of title before the Courts below. I reiterate here that two



grounds had been taken on behalf of the plaintiffs to establish their title; firstly, that they acquired title through deed of relinquishment, and secondly, on the strength of adverse possession. The opinion of the Courts below that no right could be said to have been created on the basis of deed of relinquishment cannot be faulted with. Plea of adverse possession, in my opinion, could not have been a ground for the plaintiffs to establish their title. Additionally, the trial Court appears to be right in its opinion that in any event, the appellants had failed to make out any case of adverse possession in the absence of specific period during which they could claim possession adverse to the interest of others.

21. In my opinion, the Courts have not relied on Exhibit-C, sale deed dated 29.01.1980, to dismiss the plea of title of the appellants over the suit property. On the other hand, the Courts below have recorded their concurrent finding that the appellants could not establish their title. The first Substantial question of law, as framed by this Court in the order dated 09.05.2008, is answered accordingly.

22. The trial Court has held, upon going through evidence adduced at the time of trial, that the ancestors of the appellants were given permissive possession. Said concurrent findings cannot be said to be without evidence.



23. Accordingly, I do not find any merit in this second appeal, which is thus dismissed.

24. There shall be no order as to cost.

Pawan/-

(Chakradhari Sharan Singh, J)

AFR/NAFR	N.A.F.R.
CAV DATE	20.06.2019
Uploading Date	19.07.2019
Transmission Date	N/A

